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IN THE

Supreme Court of the United States

OCTOBER TERM 1969

NO. 580

DAVID I. WELLS,

Appellee,

v

NELSON A. ROCKEFELLER, as Governor of the State of New York, LOUIS J. LEFKOWITZ, as Attorney General of the State of New York, JOHN P. LOMENZO, as Secretary of State of the State of New York, MALCOLM WILSON, as Lieutenant Governor of the State of New York, and Presiding Officer of the Senate of the State of New York, and ANTHONY J. TRAVIA, as Speaker and Presiding Officer of the Assembly of the State of New York,

Appellees

JOHN A. AMBROSE and FRANCES P. HIMMELFARB,

Appellants.

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

	Page
Statement	1
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
The Questions Presented Are Substantial	5
Conclusion	8

TABLE OF AUTHORITIES

Cases

	Page
Allen Calculators v. *National Cash Register*, 322 U.S. 137 (1944)	2
Cascade Natural Gas Corp., v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967)	2
Kirkpatrick v. *Preisler*, — U.S. —, 22 L. ed. 2d 519 (1969)	6
Wells v. *Rockefeller*, — U.S. — 22 L. ed. 2d 535 (1969)	5
Wells v. *Rockefeller*, 273 F. Supp. 984, affd. 389 U.S. 421 (1967)	6, 7

STATUTES

15 U.S.C. §29	2
28 U.S.C. §1253	2
New York Executive Law §95	3

IN THE

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Appellees

JOHN A. AMBROSE and FRANCES P. HIMMELFARB,

Appellants.

JURISDICTIONAL STATEMENT

Statement

The appellants, pursuant to Rules 13(2) and 15 of the Supreme Court of the United States, file this statement as the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on direct appeal to review the order of the statutory Three Judge Court denying, without prejudice to renewal, their application for intervention as of right.

Opinions Below

The District Court wrote no opinion on this application.

However, prior aspects of this matter are reported at 273 F. Supp 984, affd. 389 U.S. 421; and at 281 F. Supp. 821, reversed and remanded—U.S.—, 22 L.ed.2d 535.

Jurisdiction

This application to intervene as of right was made pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, and oral argument was had on July 1, 1969 before the entire statutory Three Judge Court. The order denying intervention without prejudice to renewal was filed in the United States District Court for the Southern District of New York on July 3, 1969. The Notice of Appeal was filed in the same court on July 17, 1969. The jurisdiction of the Supreme Court of the United States to review this order by direct appeal is conferred by 28 U.S.C. § 1253. The Court is also respectfully referred to *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967), in which it permitted the appellants therein to appeal directly to it, pursuant to 15 U.S.C. §29, from an order denying intervention (Appendix A). Since 15 U.S.C. §29 and 28 U.S.C. §1253 are substantially similar statutes, and appeal as of right in the instant action should be deemed taken from the final judgment (Appendix B) and properly before this Court. See, *Allen Calculators* v. *National Cash Register*, 322 U.S. 137 (1944).

Questions Presented

1. The threshold question which is presented to this Court is whether, under Rule 24 (a) of the Federal Rules of Civil Procedure, it was error for the District Court to deny the unopposed* application for intervention.

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* The attorneys for appellees did not serve any papers in opposition to the application. However, George D. Zuckerman, Esq., Assistant Attorney General for the State of New York, was present at the oral argument. The motion was determined before Mr. Zuckerman said anything. Transcript, pp.11-12.

2. Whether the sole figures which may be employed in connection with the reapportionment of the congressional districts of the State of New York pursuant to the opinion of this Court in another branch of this case are the 1960 federal census figures, even if some special census figures are available.

Statement of the Case

On June 3, 1969, an original and four copies of motion papers consisting of an order to show cause containing a stay and affidavits in support of that order and in support of the motion of the applicants for intervention to intervene in this matter at the pre-judgment stage, were transmitted to the Hon. Lloyd M. MacMahon, a member of the statutory Three Judge Court which had been convened in this matter and to which this Court remanded the case for the entry of judgment.

The purpose of this application was to enable the applicants for intervention, appellants herein, to advocate their position before the Three Judge Court that the judgment to be entered herein upon the opinion of this court should embrace a decretal paragraph to the effect that the most recent special federal census figures should be employed as a basis for the reapportionment of the congressional districts of this state. These figures*, which were supplied to the court in the form of exhibits to the affidavit of Laura H. Davis which was submitted in support of the motion, could have been used as the figures for the reapportionment, or these figures could have formed the bases upon which projections of population shifts could have been made in order to reapportion the districts in a constitutional manner.

On June 12, 1969 the attorneys for the applicants for intervention received a conformed copy of the order

* The figures were obtained from the Legislative Manual of the State of New York, a Manual which is prepared by the Secretary of State of the State of New York, as required by State Law. Executive Law §95.

to show cause and supporting papers with the notation "Application denied. So ordered".

Because it was counsel's position that intervention as of right was proper in this matter, it was determined to proceed by regular notice of motion which motion was returnable on July 1, 1969 at which time the court heard oral argument in the matter. A transcript of that oral argument forms part of the Record On Appeal. On that date the application was denied from the Bench without prejudice to renewal at some time after the Legislature of the State of New York had acted pursuant to the order of the court which had been filed on June 18, 1969—*a date after this motion had been noticed and before the return date.*

The applicants for intervention are two residents of Long Island, New York. John A. Ambrose is a resident of Suffolk County in an area which is presently designated as the First Congressional District and, according to the 1960 federal census figures, this county had a population of 666,784 persons which would entitle it, under the 1960 formula, to 1.63 seats in Congress. According to the special census figures which are available for that area that county's population is now officially 935,000 which would entitle it to approximately 2.22 seats in Congress. Frances P. Himmelfarb, the other applicant for intervention, resides in Nassau County in an area which is presently designated as the Fifth Congressional District. This county, according to the 1960 census figures, had a population of 1,300,171 which would entitled it to 3.18 seats in Congress. According to the most recent special census figures, its population would now be 1,400,000 which would entitle it to 3.33 seats in Congress.

Counties are used as the frame of reference for convenience only and there is no contention that the seats should be apportioned on the basis of governmental subdivisions. In addition, the Court's attention is called to the fact that the First Congressional District and Suffolk

County are located on the Eastern end of Long Island which is also the Eastern-most extension of the State of New York, the point from which the Legislature traditionally begins to draw the lines of the Congressional Districts. Nassau County is the next Western County, and it extends the entire width of Long Island in a North-South direction. Therefore the location of the boundary lines in these districts must affect the location of the boundary lines and the population of the districts throughout the State.

As has already been demonstrated, the court below was aware that this application was pending and nevertheless saw fit to enter final judgment without awaiting the determination of this motion. At the oral argument counsel set forth the facts as recited above and requested the court to set general guidelines with respect to the reapportionment of the Legislature. Transcript, p. 6. In response to the oral argument and to the papers, Judge Moore, apparently speaking for the court, noted that all of counsel's arguments were preceded by the word "if", and viewed his court as a mere "conduit for the Supreme Court" with "nothing to do". Transcript, pp. 9-12.

The Questions Presented Are Substantial

The absolute refusal of the District Court to take cognizance of its role in implementing the determination of this court in *Wells* v. *Rockefeller*, —U.S.—, 22 L.ed.2d 535 (decided April 7, 1969) has created a situation in which the appellants will be deprived of their constitutional rights in the apportionment of Congressional Districts. As the affidavits in support of the application for intervention demonstrate, there has been an approximate 20% population increase in the two Eastern Counties of New York State since 1960, as compared with a 3.5% population growth State-wide. All indications from statements which were made at the Legislative hearings are that, in reapportioning the Congressional Districts, population data compiled in 1960 will be employed in drawing the district

lines. It is suggested that to do so will do violence to the requirements established by this court in a prior branch of this case and in *Kirkpatrick* v. *Preisler*, — U.S. —, 22 L.ed.2d 519 (1969). The result will be another unconstitutional apportionment.

The same District Court has recognized this very real possibility when, in another branch of the case, speaking through Judge Moore, it stated:

> "Had the population remained static, the court could specify the 1960 census as a base. However, no court should blind itself to the world of today. To use 1960 figures in many areas would be to enforce the disparity of which plaintiffs complain. The population changes in Staten Island (Richmond County) since the opening of the Verrazzano Bridge and the influx into Nassau and Suffolk Counties particularly in the industrialized areas have been substantial." *Wells* v. *Rockefeller*, 273 F. Supp. 984,991, affd. 389 U.S. 421 (1967).

Since none of the parties was agreeable to representing the position of the applicants for intervention that the latest available special census figures should be utilized as a basis for the reapportionment of Congressional Districts, so that a constitutional apportionment would be had, the interests of the applicants for intervention would not be represented at all by the parties. Therefore, under Rule 24 (a) of the Federal Rules of Civil Procedure, the application should have been granted as of right and the applicants for intervention should have been heard before the entry of any final order.

In addition to denying the appellants their right to intervene, the matters recited above constitute an abuse of judicial discretion.

Based upon the above, it is submitted that this Court should review the order appealed from by means of a plenary appeal in order that it many consider:

1. Whether the applicants for intervention were denied their right to intervene pursuant to Rule 24(a); and

2. Whether population data other than the 1960 federal census figures, if reliable, should be employed in order to obtain a constitutional apportionment. This question, it is submitted, is critical in this case and in others presently pending, and has never been passed upon by this court. See, *Rockefeller* v. *Wells*, 389 U.S. 421 (1967) Harlan, J. dissenting.

From the outset, the appellants sought to stay all proceedings in order to have the motion returnable and heard as expeditiously as possible. Thus an order to show cause together with all other supporting papers was submitted to the Three Judge Court on or about June 3, 1969. The application was denied in all respects on June 10, 1969. The appellants then proceeded by notice of motion dated June 13, 1969 and have prosecuted every step of the proceeding in a rapid fashion. On June 18, 1969 the Three Judge Court entered a final judgment purportedly implementing this court's opinion. On July 1, 1969 oral argument on the application was had and it was denied from the Bench. The Notice of Appeal was filed on July 17, 1969. On July 22, 1969, an application was made, pursuant to Rule 62 of the Federal Rules of Civil Procedure, for a stay of the order requiring reapportionment. This motion was returnable on August 5, 1969, and was denied on September 3, 1969.

It is appellants' desire that this Court speak on the issue of what population data should be employed in order to achieve a reapportionment which will pass constitutional muster, and cause a minimum of delay.

CONCLUSION

For all the above reasons appellants respectfully submit that this Court has jurisdiction of this appeal and that it should order oral argument and the submission of briefs.

Respectfully submitted,

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Of Counsel

APPENDIX A

ORDER DENYING INTERVENTION

Motion for leave to intervene denied without prejudice to renewal before this court after the Legislature of the State of New York has acted pursuant to the order of this court. So Ordered.

LEONARD P. MOORE
USCJ

JOHN M. CANNELLA
USDJ

LLOYD F. MACMAHON
USDJ

July 1, 1969
Filed: 7-3-69

APPENDIX B.

ORDER ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

The United States Supreme Court having rendered its order and judgment on the appeal taken from the order of this Court dated April 1, 1968 and having remanded this case to this Court for further proceedings consistent with its opinion in this case (October Term, 1968, No. 238, decided April 7, 1969), and the mandate of the United States Supreme Court having been received by this Court, it is hereby

ORDERED, ADJUDGED AND DECREED that pursuant to Rule 34 of the Rules of this Court, the order and judgment of the Supreme Court of the United States entered in this action on April 7, 1969, be, and it hereby is, made the order and judgment of this Court; and it is further

ORDERED, ADJUDGED AND DECREED that the Legislature of the State of New York shall enact into law not later than January 30, 1970, or at any prior special session thereof a congressional districting plan consistent with the opinion of the Supreme Court, *supra*, and which shall govern the election of members of the United States House of Representatives from the State of New York in the primary and general elections in the year 1970; and it is further

ORDERED, ADJUDGED AND DECREED that this Court shall retain jurisdiction of this case to conduct such further proceedings as may be necessary and to assure compliance with the within order.

Dated: New York, New York
June 17, 1969

LEONARD P. MOORE, U.S.C.J.
LLOYD F. MAC MAHON, U.S.D.J.
JOHN M. CANNELLA, U.S.D.J.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1969

No. 580

JOHN A. AMBROSE and FRANCES P. HIMMELFARB,
Appellants,

against

DAVID I. WELLS,
Plaintiff-Appellee,

and

NELSON A. ROCKEFELLER, as Governor of the State of New York, LOUIS J. LEFKOWITZ, as Attorney General of the State of New York, JOHN P. LOMENZO, as Secretary of State of the State of New York, MALCOLM WILSON, as Lieutenant Governor of the State of New York, and Presiding Officer of the Senate of the State of New York, and PERRY B. DURYEA, JR., as Speaker and Presiding Officer of the Assembly of the State of New York,
Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

	PAGE
Statement	2
ARGUMENT:	
POINT I—This appeal is not within the jurisdiction of this Court	5
POINT II—Appellants' application to intervene and appeal from the order denying such application are totally premature	6
Conclusion	7

TABLE OF AUTHORITIES

Cases:

American Insurance Company v. *Lucas*, 314 U. S. 575	5
Cobbledick v. *United States*, 309 U. S. 323	5
Golden v. *Zwickler*, 394 U. S. 103	6
Poe v. *Ullman*, 367 U. S. 497	6
Public Service Commission v. *Brashear Freight Lines*, 306 U. S. 204	5
Wells v. *Rockefeller*, 394 U. S. 542	2

STATUTES

15 U.S.C. § 29	5
28 U.S.C. § 1253	5
Federal Rules of Civil Procedure; Rule 24(a)	6
Rules of the United States Supreme Court, Rule 16	1

IN THE

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OCTOBER TERM 1969

No. 580

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Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, defendants-appellees Nelson A. Rockefeller, Louis J. Lefkowitz, John P. Lomenzo, Malcolm Wilson and Perry B. Duryea,

Jr., joined by plaintiff-appellee, David I. Wells, move to dismiss on the ground that this appeal is not within the jurisdiction of this Court, or, in the alternative, to affirm on the ground that the questions presented by this appeal are so insubstantial as not to require further argument.

Statement

In *Wells* v. *Rockefeller*, 394 U. S. 542, this Court reversed the judgment of the District Court insofar as it approved the congressional districting plan set forth in Chapter 8 of the New York Laws of 1968 for use in the 1970 election and remanded the case for the entry of a new judgment consistent with its opinion.

Upon remand, the District Court entered an order on June 17, 1969 directing the New York Legislature to enact into law not later than January 30, 1970 a congressional districting plan consistent with the opinion of this Court.*

Appellants are two residents of Long Island, New York who, until the time of the above remand from this Court, had not participated in any of the proceedings in this civil action which was first instituted in June, 1966. Appellants first moved to intervene in the above action by the filing of an order to show cause on June 3, 1969. Following the denial of this application on June 10, 1969, appellants renewed their application to intervene by regular notice of motion which was returnable on July 1, 1969 at which time the three-judge statutory Court heard oral argument in the matter.

In arguing for intervention, appellants' counsel asserted that if the New York Legislature drew new congressional lines using 1960 census figures, the residents of Long Is-

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* The order on remand is reprinted in appellants' Jurisdictional Statement, Appendix B.

land would be prejudiced and asked the District Court to set "general guidelines" for the New York Legislature to follow in the drawing of new conggressional lines. Transcript of Hearing, July 1, 1959, pp. 2-9.

At the close of appellants' argument, Circuit Judge Moore, speaking for the three-judge Court, stated (*ibid.*, pp. 9-11):

> "JUDGE MOORE: Your argument, Mr. Armentano, is that practically every sentence is preceded by the word 'if.' You don't know any more than we know what lines the Legislature will draw.
>
> We have and are now only a conduit for the Supreme Court. They have issued an opinion, and they have directed us to tell the Legislature to go ahead in accordance with their opinion.
>
> So far as we are concerned, we are virtually functioning ex officio at this particular time. We have nothing to do. By the same token, you and your clients are not prejudiced in any way, because when, as and if the Legislature draws these new lines, then you can look them over, you can renew your application.
>
> This Court is retaining jurisdiction of course until the Legislature shall have acted. But it is no point for us to speculate as to what the Legislature is going to do when the Legislature hasn't as yet done it.
>
> And as Judge Cannella points out, if they do as they have indicated, hold public hearings, there is no reason why you, your clients or anybody else in the State can not go up and tell them how to do it. But certainly, we can not tell the Legislature in advance of not knowing what they intend to do.
>
> In effect, you are asking the Court to draw lines, and we can't say this should go down one side of Atlantic Avenue in Long Island and up the other side.
>
> Why don't you wait and see? It seems to me your applicant is completely premature at this time.

In other words, you go on the basis that the Legislature is going to use 1960 figures. I can't tell you, and you can't even argue to us that they are going to, because I doubt very much if you can speak for the Legislature any more than we feel that we can.

We are keeping the case open. We are retaining jurisdiction, and of course—so that at this time, we will deny your motion to intervene, but without prejudice when action has been taken.

And if you are agreed, you think yourself aggrieved, you might be completely surprised. You might be the happiest group of people out in Suffolk and Nassau that exist in the State.

And the real aggrieved people might be in the heart of Syracuse, Rochester or up along the St. Lawrence border. We don't know.

So your rights are fully protected by this denial without prejudice to renew your motion when, as and if the Legislature has acted and you have a chance to see what you want to shoot at, if you want to shoot at all.

* * *"

The three-judge Court entered an order on July 1, 1969 denying appellants' Motion for Leave to Intervene "without prejudice to renewal before this Court after the Legislature of the State of New York has acted pursuant to the order of this Court."* Appellants have appealed from this order.

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* The order denying intervention is reprinted in appellants' Jurisdictional Statement, Appendix A.

ARGUMENT

I.

This appeal is not within the jurisdiction of this Court.

Appellants claim that jurisdiction of this appeal is conferred by 28 U.S.C. § 1253 (Jurisdictional Statement, p. 2).

Under 28 U.S.C. § 1253, an appeal to this Court from a three-judge Court must be "from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a District Court of three judges." The order appealed from does not meet this statutory requirement. That order neither granted nor denied an interlocutory or permanent injunction, but merely denied appellants' application to intervene without prejudice to renew the application after the Legislature has acted pursuant to the order of the District Court.

Since the order of July 1, 1969 did not grant or deny an interlocutory or permanent injunction, it is not directly appealable to this Court. *American Insurance Co.* v. *Lucas*, 314 U. S. 575; *Public Service Commission* v. *Brashear Freight Lines*, 306 U. S. 204.

Appellants also claim that their right to appeal is supported by 15 U.S.C. § 29. However, this section only permits direct appeals in actions in which the United States is a complainant under the anti-monopoly laws and obviously has no applicability to this case.

Appellants' appeal is also defective in that it is not taken from a final order of the District Court, but rather from a denial of an application to intervene without prejudice to appellants' renewal of such application at a future date after the Legislature has enacted a new congressional districting plan. Accordingly, it is not ripe for appellate review. *Cobbledick* v. *United States*, 309 U. S. 323.

II.

Applicants' application to intervene and appeal from the order denying such application are totally premature.

It is fundamental that federal courts may only adjudicate actual controversies and may not issue advisory opinions or decide premature or hypothetical questions. *Golden* v. *Zwickler*, 394 U. S. 103, 108 (1969); *Poe* v. *Ullman*, 367 U. S. 497 (1961). In accordance with this policy, the District Court had no alternative but to deny appellants' application to intervene after finding it to be "completely premature." Transcript, p. 10.

In substance, appellants, in moving to intervene, were seeking to challenge a congressional districting plan before it had even been enacted by the New York Legislature or even drafted by a legislative committee. Appellants' threat of injury was based on no more than unsupported predictions as to what the Legislature might do.

Although appellants claim that their application to intervene was based on Rule 24(a) of the Federal Rules of Civil Procedure, they failed to meet the requirements of that rule of showing that their interest might be impaired by the disposition of this action, or that their interest was not adequately protected by the existing parties. Indeed, since their application was made before the enactment of any new congressional districting plan, it would have been impossible for the Court below to determine whether appellants satisfied the requirements of Rule 24(a).

In any event, appellants have not been prejudiced from the order in which they have taken this appeal. The District Court has retained jurisdiction and has permitted appellants to renew their motion to intervene after the Legislature has enacted a new congressional redistricting plan if they believe they have been aggrieved by its provisions.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed, or in the alternative, the order of the three-judge court of July 1, 1969 should be affirmed.

Dated: New York, New York, October 8, 1969.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1969.

AMBROSE ET AL. *v.* WELLS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 580. Decided December 8, 1969.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction.